STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2004-481

September 8, 2004

CHRIS WRIGHT
Request for Commission Investigation Into
Central Maine Power Company's Promotion
of Increased Electricity Consumption

ORDER DISMISSING
COMPLAINT

WELCH, Chairman; DIAMOND and REISHUS, Commissioners

I. SUMMARY

Through this Order, we dismiss the Complaint against Central Maine Power Company (CMP) regarding its promotion of the increased consumption of electricity as we find it is without merit.

II. BACKGROUND

On July 19, 2004, the Commission received a Complaint signed by Chris Wright and 18 other persons against CMP regarding its promotion of the increased consumption of electricity. The Complaint, filed pursuant to 35-A M.R.S.A. § 1302, states that CMP's promotion of the use of electricity consuming appliances, lighting, air conditioners, dehumidifiers, hot water heaters and space heaters is contrary to the best interests of Maine's citizens. The Complaint cites the increased dependence on foreign oil, the degradation of the environment, and the increased likelihood of armed conflict that results from electricity consumption. Moreover, the Complaint states that Maine, along with other New England states, is involved in various legal actions to protect against airborne pollution from electricity producing power plants that make fish in Maine rivers unsafe to eat and increase ozone levels that make the air unsafe to breathe. The Complaint asks for an immediate cessation of all promotion of the increased consumption of electricity by CMP.

On July 29, 2004, CMP filed its response, stating that the Complaint fails to meet any legitimate basis for the Commission to proceed with an investigation and must be dismissed as without merit. CMP states that the Complaint is without merit because the Commission does not have the statutory authority to grant the requested relief and the practices complained of are neither unreasonable nor otherwise prohibited. CMP asserts that a complete ban on utility advertising to promote electricity consumption would violate its Constitutional rights, be contrary to Commission rule, and inconsistent with prior Commission decisions. In addition, CMP disputes assertions that its advertisements are unreasonable or irresponsible in that it promotes the efficient use of electricity, an activity that CMP states is consistent with State policy.

III. DISCUSSION

The Complaint in the proceeding was filed pursuant to section 1302 of Title 35-A. Section 1302 allows for complaints by ten persons aggrieved by the rates, tolls, charges, adequacy or availability of service, or the practices and acts of a public utility. The section specifies that the Commission shall dismiss the complaint if the utility has taken sufficient steps to remove the cause of the complaint or if the complaint is without merit. 35-A M.R.S.A. § 1302(2). The Law Court has stated that a section 1302 complaint is "without merit" when there is no statutory basis for the complaint in that the Commission has no authority to grant the relief requested or that the rates, tolls, practices and services are not in any respect unreasonable, insufficient or unjustly discriminatory. *Agro v. Public Utilities Commission,* 611 A.2d 566, 569 (Me. 1992). The essence of the Complaint in this proceeding is that CMP's promotion of electricity consumption is an unreasonable utility practice. For the reasons discussed below, we conclude that the Complaint is without merit and therefore must be dismissed.

The relief requested in the Complaint is that the Commission order the immediate cessation of all promotion of the increased consumption of electricity by CMP. Such action by the Commission would impinge on CMP's First Amendment right of free speech. The Maine Law Court has recognized that the speech of heavily regulated utilities, such as CMP, is protected by the First Amendment, *Central Maine Power Company v. Public Utilities Commission,* 734 A.2d 1120, 1126 n. 5 (Me. 1999), and the United States Supreme Court has held that a regulation that completely bans an electric utility from advertising to promote the use of electricity (under the circumstances of that case) violated the First and Fourteenth Amendments, *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York,* 447 U.S. 557 (1980). We do not conclude that any governmental attempt to restrict or prohibit the promotional activities of a utility would be violative of the Constitution.[1] However, we are unable to find any explicit statutory authority for the Commission to act in a manner that seriously restricts free speech rights of a utility through a total ban on promotional activities.[2]

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[1] The promotion of electricity consumption would likely be considered "commercial speech" and thus accorded lesser constitutional protection than other forms of expression. Commercial speech can be restricted if the governmental interest to be served is substantial, the regulation directly advances the asserted governmental interest, and the regulation is not more extensive than is necessary to serve that interest. *Central Hudson,* 477 U.S. at 561-567.

[2] As noted, for a ban on commercial speech to be constitutional, findings would have to be made that the ban advances a legitimate government interest in a minimally intrusive manner. The concerns raised in the Complaint are essentially ones of environmental damage and public health. As economic regulators, the Commission is not well positioned to make the findings that would be required to restrict commercial speech in this case and there are no statutory provisions that suggests that we have the authority to make such findings. The Legislature is the more appropriate body to consider whether a total ban or some other restriction on utility promotional advertising should occur and to make the determination that such action is warranted despite its impact on utility speech.

In the absence of explicit statutory authority regarding the restriction of promotional advertising, the only basis upon which the Commission can act on the Complaint is to find CMP's actions to be an unreasonable utility practice. For the following reasons, such a finding cannot be made in this case. As a general matter, it is not considered an unreasonable practice for any business to promote the use of its products or services. For example, it is not considered unreasonable for a manufacturer or a retail outlet to advertise the use of air conditioners or other electricity consuming appliances. More specifically, CMP's promotional activities are contemplated by Commission rule and consistent with language in prior Commission decisions. Chapter 83 of the Commission rules, among other matters, governs promotional advertising by utilities. The rule does not prohibit such advertising, but generally requires that the costs of promotional activity not be recovered from ratepayers. Ch. 83, § 5(C). In a 2001 proceeding, the Commission reviewed whether CMP was accounting for its promotional activities in a manner consistent with the requirements of Chapter 83. The Commission confirmed that CMP would not seek the recovery of its promotional costs from ratepayers and, in its Order declining to proceed with a formal investigation, stated that, although the wisdom of promoting electricity consumption might be questioned, "such promotions are not unlawful and may constitute protected free speech…." *Petition to Initiate Investigation of Issues Regarding Central Maine Power Company's May 2001 Bill Insert,* Docket No. 2001-369 at 2 (July 11, 2001). Because CMP's efforts to promote electricity consumption represent a typical business practice that is contemplated by Commission rule and consistent with prior Commission decisions, a finding cannot be made in this proceeding that that such activities constitute an unreasonable utility practice.[3]

To conclude, we find no explicit statutory basis for the Commission to act to order the cessation of all promotion of the increased consumption of electricity by CMP. Additionally, we cannot find CMP's promotional activity to be an unreasonable utility practice. Therefore, we do not have the authority to grant the requested relief and we dismiss the Complaint filed in this proceeding as without merit.

Accordingly, we

ORDER

That the Complaint filed on July 19, 2004 is hereby dismissed.

[3] We also note that CMP operates under an alternative rate plan in which shareholders take enhanced risks regarding sales and expenses. Under its rate plan, CMP is restricted to a large degree from seeking rate changes based on increased expenses or its level of revenues. As such, basic issues of fairness would arise if a utility were to be severely limited in its ability to seek increased revenues (such as through promotional activities), while its shareholders have the financial risk associated with reduced sales and inadequate revenues.

Dated at Augusta, Maine, this 8th day of September, 2004.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Diamond
Reishus

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.